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No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF DELAWARE,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE COMPLAINT

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ARGUMENT

I. THIS COURT SHOULD TAKE JURISDICTION OF THIS DISPUTE IN ORDER TO PREVENT NEW YORK FROM DEPRIVING DELAWARE OF ITS RIGHTS AS ESTABLISHED BY THIS COURT IN TEXAS V. NEW JERSEY AND PENNSYLVANIA V. NEW YORK.

New York argues that this Court should not take this case because it is based upon "a profound misunderstanding of the facts," *i.e.*, New York is not escheating intangible personal property of unknowns as Delaware claims; rather New York is escheating the property of "creditor brokers" having their trading addresses in New York (NY Br. 1). That argument is inconsistent with the position of New York in taking the property; it is inconsistent with the position of the securities industry from whom New York has taken the property; and it contravenes the express holdings of *Texas v. New Jersey*, 379

U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972), to which New York gives lip service but no substantive obedience.

A. New York Has Taken The Intangible Personal Property At Issue Here As Property Of Unknowns.

New York cannot deny that, contrary to *Texas v. New Jersey* and *Pennsylvania v. New York*, it has routinely purported to compel the escheat to New York of intangible personal property belonging to unknown owners and has directed the Delaware Brokerage Corporations[1] to pay over to it such property. Thus, the 1983 edition of New York's "Abandoned Property Law Handbook for Brokers and Dealers,"[2] expressly directed payment to New York of intangible property where "the persons or customers entitled to such payment cannot be identified (unknown)" (Exhibit C, p. 71). The 1988 edition of New York's "Handbook for Reporters of Unclaimed Funds," which New York has lodged with the Clerk (NY Br. 10 n. 10), also directs the brokers to pay to New York "amounts . . . held . . . for unknown parties or addressee unknown . . . whether or not the broker is incorporated in New York" (p. 40).

In its seven-year-old administrative proceeding against PaineWebber Incorporated, involving part of the intangible personal property at issue here, New York has admitted (A3-4):

> Generally, such dividends and securities, when received and held by a brokerage house in its "street name", and not readily attributable to customer accounts, are held for "unknown" owners.
>
> * * *
>
> In this matter, . . . not only the addresses of the creditors, but their identities as well are unknown . . .

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1. Corporations incorporated under the laws of Delaware as defined in Delaware's opening brief, p. 17.

2. Excerpts of which were attached to Delaware's opening brief, pp. 64-75.

Further, New York has admitted in the PaineWebber proceeding that, but for New York's shorter escheat statute, Delaware, as the state of incorporation of PaineWebber, would be entitled to escheat the property at issue there as property of unknowns (A4-5). To Delaware's knowledge, New York has not advanced in the lengthy PaineWebber proceeding the contention it advances here, apparently for the first time, that the property it has been taking for seventeen years as property of unknowns, is not really such.

B. The Securities Industry From Which New York Has Seized The Intangible Personal Property At Issue Here Has Surrendered It As Property Of Unknowns.

The Securities Industry Association, Inc. ("SIA"), the principal trade association of the securities industry which has hundreds of members including Delaware Brokerage Corporations, many of which have their trading addresses in New York (SIA Br. 2), has filed an *amicus* brief herein. In urging that this Court take this case, the SIA confirms that the intangible personal property in issue here has been demanded and taken by New York for years as the property of unknowns (SIA Br. 2-3):

> Delaware Brokers frequently hold monies and other intangible property for which they cannot identify a beneficial owner, much less a last known address for the owner. Over the years, the State of New York has routinely compelled delivery of this property by Delaware Brokers under Article V-A of the New York Abandoned Property Law . . .
>
> * * *
>
> . . . New York's prior enforcement of its expansive escheat policy has led to New York's assertion of claims against Delaware Brokers for the very property that is in issue in this action.
>
> * * *
>
> . . . New York has derived substantial revenues from es-

cheating property from the Delaware Brokers where no last known address for an owner of the property can be determined.

C. New York's Argument Contravenes *Texas v. New Jersey* And *Pennsylvania v. New York.*

Under *Texas v. New Jersey* and *Pennsylvania v. New York*, in order for New York to be able to escheat the abandoned property in question from debtor Delaware Brokerage Corporations, it must be "the State of the last known address of the creditor, *as shown by the debtor's books and records.*" *Texas v. New Jersey*, 379 U.S. at 682 (emphasis added); *Pennsylvania v. New York*, 407 U.S. at 210. New York undertakes to explain away its having expressly demanded and received property of unknowns by asserting that its illegal behavior was of no practical significance[3] because the books and records of the Delaware Brokerage Corporations either do really show or could be made to show that the abandoned property at issue here belonged to creditor brokers having trading addresses in New York (NY Br. 1, 3-4, 7).

Any contention that the records of the Delaware Brokerage Corporations show creditor brokers having their trading addresses in New York as the owners of the property is incredible on its face. If the records did show that, the property would have been paid over to the creditor brokers, as New York must admit (NY Br. A-3 ¶3).[4]

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3. In fact, New York claims an advantage from its illegal procedures. Under *Texas v. New Jersey*, the state of incorporation of the debtor escheats and holds the abandoned property of unknowns until another state can prove a superior right. 379 U.S. at 682. Thus, in this case, had Delaware taken the property of unknowns, New York would have had the burden of proving that the owner of such property had a New York address. New York claims that Delaware now has the burden of proving that the property is not that of a New York addressee (NY Br. 3, 30), even though New York took the property as that of unknowns.

4. In any event, under Section 513-a of the New York Abandoned Property Law, the brokers are required to retain their records for only eight years (NY Br. 10). Accordingly, for the period 1971 to 1980, Delaware is entitled to judgment that the property seized by New York is from unknowns and, accordingly, may be escheated only by Delaware.

As the SIA states in its *amicus* brief, the Delaware Brokerage Corporations have already been subjected to "lengthy" audits by New York with respect to the property in issue (SIA Br. 2). New York's brief confirms that (NY Br. A-1, A-3, ¶¶ 1 and 3). In short, what is left, out of the billions of dollars of transactions conducted by the securities industry each year, are relatively small amounts of funds—still amounting to millions of dollars—for which there is no practical way to determine the owners from the books and records of the Delaware Brokerage Corporations. Surely, had there been any practical way to maintain or reference such records, the sophisticated, financially-motivated Delaware Brokerage Corporations would have done so to their own collective gain rather than abandoning the property and surrendering it to New York. Indeed, New York concedes that it is "not practicable" to reconstruct most overpayment transactions (NY Br. 13).[5]

What New York's argument really comes down to is that such records could now be created either without regard to practical considerations of time and expense or based upon certain assumptions or presumptions concerning the alleged facts, such as the manner in which the securities industry conducts its business and satisfies customers' claims, and statistical probabilities based upon trading activities.[6]

But any such contention by New York flies in the face of

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5. If New York (or any other state) wishes records to be kept in a certain way, it is free to compel the keeping of such records, as this Court has recognized. *Pennsylvania v. New York*, 407 U.S. at 215. Absent such legislation, however, New York is not entitled, under *Pennsylvania v. New York* and *Texas v. New Jersey*, to take property shown by the records of the debtors as the property of unknowns, on the theoretical basis that if perfect records had been or could be kept they would show that the creditors were located in New York.

6. For example, New York assumes that the customers of the creditor brokers "should have been fully satisfied in the ordinary course of business" (NY Br. 13), that "the names and addresses of the creditor brokers appear on the debtor brokers' records" (NY Br. 8), and that the "trading addresses" of the creditor brokers are the relevant addresses (NY Br. 7). Delaware denies that such records, if they existed, would show what New York contends. In short, Delaware disputes New York's contention that "it would be possible to reconstruct most of the transactions . . ." (NY Br. 8).

the bedrock principle established in *Texas v. New Jersey* and reaffirmed in *Pennsylvania v. New York* that disputes between states concerning escheat matters must be resolved by a rule which (1) will cover all disputes between the states with respect to all intangible personal property and (2) will be easy to administer. The whole point is to eliminate the need for litigation between the states by taking away the fertile breeding ground for controversy of distinction and complicated factfinding.

Accordingly, in *Texas v. New Jersey*, this Court rejected any notion of looking beyond a debtor's own books and records for an address of the creditor, stating at 379 U.S. 681 n. 11:

> . . . [S]ince ease of administration is important where many small sums of money are involved, the address on the records of the debtor, which in most cases will be the only one available, should be the only relevant last-known address.

And, in *Pennsylvania v. New York*, this Court rejected Pennsylvania's argument that since abandoned Western Union money orders were purchased in Pennsylvania, it was reasonable to presume that most were purchased by Pennsylvanians and should be escheated there, in the absence of an address of some other state on the records of Western Union. Ruling that New York, as the state of incorporation, could escheat such property as that of unknowns, this Court noted at 407 U.S. 215:

> [T]o vary the application of the Texas rule according to the adequacy of the debtor's records would require this Court to do precisely what we said should be avoided—that is, "to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to the everdeveloping new categories of facts."

New York, of course, urged this Court to that holding from which it benefitted. Now, when its financial interest runs the other way, its newly crafted argument calls on this Court to reverse the above holdings and to conclude that

because the debtors' records are not adequate to determine the true creditors, disputes between states involving the escheat of intangible personal property from brokerage houses should be resolved not as other escheat disputes are resolved—on the basis of the records as kept by the debtor—but on the basis of constructive records turning upon presumptions, assumptions or the particular facts of the conduct of transactions by brokerage houses.[7] Under *Texas v. New Jersey* and *Pennsylvania v. New York*, no case-by-case factual determination is called for or permitted. Delaware asks this Court to confirm that its prior decisions mean what they say and to direct New York to obey them.

In sum, New York's brief in opposition to Delaware's motion for leave to file its complaint is an elaborate straw man constructed in an effort to persuade this Court that the dispute between New York and Delaware is a simple factual misunderstanding which could readily be resolved by discussion or fact-finding, rather than what it truly is—a fundamental dispute between two states as to the applicability of the teachings of *Texas v. New Jersey* and *Pennsylvania v. New York* to the escheat of property from the Delaware Brokerage Corporations. This Court should take this case and resolve that dispute.

II. THE COMPLAINT PRESENTS A JUSTICIABLE CONTROVERSY WARRANTING THE EXERCISE OF THIS COURT'S ORIGINAL AND EXCLUSIVE JURISDICTION.

Having acquired the intangible personal property in issue on the basis that it was the property of unknowns, which is property only Delaware can escheat, it comes with ill grace for New York to argue that Delaware is not now entitled to ask

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7. If New York's hypothetical records were to govern, there would no longer be any abandoned property since, according to New York (which Delaware denies), such records would show the owner of the property to be a creditor broker in New York which undoubtedly would claim and be entitled to the property (New York Abandoned Property Law §1406(1), NY Br. 10-11).

this Court to exercise its original jurisdiction. New York contends that Delaware should be content to pursue a remedy against New York in its own backyard, including an administrative proceeding before the New York State Comptroller,[8] who has already determined that New York is properly escheating the property in issue. In that proceeding, according to New York, Delaware would have the burden of proving the absence of New York address records, even though New York took the property as property of unknowns.[9]

Not surprisingly, New York's position runs counter to a fundamental principle underlying Supreme Court original jurisdiction over disputes involving states, as set forth by this Court in *Ohio v. Wyandotte Chemical Corp.*, 401 U.S. 493, 500 (1971), cited repeatedly in New York's brief for other purposes:

> [N]o State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not reality, of partiality to one's own.

As shown in Section I of this brief, Delaware and New York are not divided only as to factual issues. The fundamental dispute here arises from New York's emasculation of the requirement of the prior decisions of this Court that the rule for resolving escheat disputes between states concerning intangible personal property must be one which is easy and practical to administer and which will apply to all cases with-

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8. *See* New York Abandoned Property Law §1406(1)(b).

9. The administrative proceeding provided by Section 1406(1) of the New York Abandoned Property Law does not offer Delaware the relief it seeks here. Such a proceeding is limited to claims for amounts paid to New York, without interest and subject to a one-percent service charge. *See* New York Abandoned Property Law §§1405-1407. While New York suggests otherwise (NY Br. 28), we know of no authorization for declaratory or injunctive relief in a New York administrative proceeding. It may also be noted that the PaineWebber proceeding, which raises the same issue raised here, has been pending for seven years without resolution. Under such circumstances, this Court should hear this case. *Cf. Maryland v. Louisiana*, 451 U.S. 725, 743 (1981).

out variation according to the adequacy of the debtor's records. This Court, not the New York State Comptroller, can and should resolve this dispute. As recognized in *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71, 79 (1961):

> [I]t [is] imperative that controversies between different states over their right to escheat intangibles be settled in a forum where all the states that want to do so can present their claims for consideration and final, authoritative determination. Our Court has jurisdiction to do that.

See also R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 473 (6th ed. 1986) ("In *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961), the Court directed that states with conflicting escheat claims should seek to settle their controversies by invoking the Court's original jurisdiction."). This Court should grant Delaware's motion for leave to file its complaint.

CONCLUSION

For the reasons stated in its opening brief and herein, Delaware's motion for leave to file its complaint should be granted and the dispute should be resolved according to this Court's precedents which establish that Delaware is entitled to escheat the property at issue.

Respectfully submitted,

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May 19, 1988

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EDWARD V. REGAN
STATE COMPTROLLER

February 17, 1982

Honorable Daniel Gutman
P.O. Box A
Gypsy Trail Road
Carmel, New York 10512

Re: In the Matter of the Application of The Office of the State Comptroller, PETITIONER, for a certification that certain property held by Paine Webber Jackson & Curtis, Inc., RESPONDENT, be deemed abandoned property

Dear Judge Gutman:

Pursuant to the understanding previously reached and agreed upon between yourself, the undersigned, and Judith Welcom, Esq., of Bro n, Wood, Ivey, Mitchell & Petty, Counsel for Paine Webber Jackson & Curtis, Inc., the attached statement of position is being provided for your consideration. The understanding reached was that both parties would provide you with brief statements of position prior to the hearing scheduled for Friday, February 26, 1982, and exchange those with each other, approximately one week before the scheduled hearing date.

Accordingly, the attached is being furnished with a view toward apprising you of the Comptroller's legal position regarding this matter.

Thank you for your cooperation.

Very truly yours,

/s/ ROBERT L. ELLENBERG
Robert L. Ellenberg
Assistant Counsel

RLE:eb
Enc.

cc: Judith Welcom, Esq.
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PRELIMINARY STATEMENT OF POSITION

IN THE MATTER OF THE APPLICATION OF THE OFFICE OF THE STATE COMPTROLLER, PETITIONER, FOR A CERTIFICATION THAT CERTAIN PROPERTY HELD BY PAINE WEBBER JACKSON & CURTIS, INC., RESPONDENT, BE DEEMED ABANDONED PROPERTY

Unclaimed dividends (both cash and stock) and securities are presently held in this State by Respondent, a brokerage house having its principal place of business in New York State but holding a charter of incorporation granted by the State of Delaware. Petitioner has made claim upon all such dividends and securities held for three or more years, pursuant to section 511(1) and 511(2) of the Abandoned Property Law. Those sections provide that all dividends and securities unclaimed for three years, as of December 31st of any year, held or received in this State by a broker or dealer as holder of record, shall be deemed abandoned property and reported and transferred as such to the State Comptroller no later than the 10th day of March of the following year. Generally, such dividends and securities, when received and held by a brokerage house in its "street name", and not readily attributable to customer accounts, are held for "unknown" owners.

Respondent has resisted this claim on the ground that, as a Delaware corporation, all dividends and securities held by it for "unknown" owners are reportable as abandoned property to Delaware only, under the rule enunciated by the United States Supreme Court in *Texas v. New Jersey*, 379 U.S. 674, 85 S. Ct. 626, 13 L. Ed 2d 596 (1965) and affirmed and extended by the Court in *Pennsylvania v. New York*, 407 U.S. 206, 92 S. Ct. 2075, 32 L. Ed. 2d 693 (1972).

The rule, simply stated, is that when more than one state asserts a right to escheat (or take custodially) unclaimed

property under applicable State statutes, the State in which the last known address of the creditor is located shall have priority of escheat. If such address is unknown, however, the state of corporate domicile of the debtor shall have such priority. In this matter, since not only the addresses of the creditors, but their identities as well are unknown, Respondent is asserting that the alternative to the rule must apply and the state of Respondent's incorporation, *i.e.* Delaware, is the proper escheator.

Under Delaware law (12 Delaware Code Annotated, Escheats, §§1197, 1198) any unclaimed securities and dividends held for seven years by a brokerage house incorporated in such state are deemed abandoned property and are reportable and deliverable to the State Escheator, except for securities and dividends held for owners whose last known addresses are in other states. (Ibid, §§1199, 1201, 1211). Unclaimed securities and dividends, therefore, which are held for seven years for unknown owners would be reportable and deliverable to the State of Delaware.

To the best of Petitioner's knowledge, the State of Delaware has not made claim upon respondent for any abandoned property which would be presently reportable and payable under its statute.

It is clear that the rule enunciated in the *Texas* decision would, if applied to the present factual situation, permit Delaware to escheat all dividends, interest and securities held by Respondent, so long as such dividends, interest and securities were held by the brokers for seven years and the owners thereof were unknown or their addresses were unknown. The issue, then, is whether the *Texas* rule applies to unclaimed property held by Respondent.

An initial examination of the *Texas* decision indicates that the rule applies absolutely. In *Pennsylvania v. New York*, the Court intimated that the *Texas* rules were to apply to all types of abandoned property situations. However, the *Texas* rule applies to a controversy between states over the right to

escheat a particular *res* held by a debtor subject to the jurisdiction of competing sovereignties. It does not apply to the claim of one state only against such *res* so long as the claiming state has a statute which provides for the escheat (or custodial taking) of the *res* and which provides for jurisdiction over the holding debtor. As long as all statutory conditions necessary to precede escheat have been complied with or have occurred, the *Texas* rule may not be used as a defense by the debtor if no other state has made claim, under its escheat statutes, upon the *res*. Any claim on behalf of the state of Delaware must be exercised by such state; it cannot be advanced by the holder of unclaimed property. It should be noted that, in the *Texas v. New Jersey* and *Pennsylvania v. New York* decisions cited *supra*, all four states had jurisdiction of and escheat coverage over the debtor, and all states had made formal claim upon the debtor for the transfer of the *res* as abandoned property.

In this instance, the Delaware statute has jurisdiction over the debtor and the *res* in question [Delaware Code Annotated §1198(6)(9)], yet it requires a seven year period of inactivity prior the *res* becoming subject to its terms (§1198(8)). Similarly, New York has jurisdiction over the debtor (Abandoned Property Law §510) and the *res* (§511), yet, in New York, the dormancy period preceding abandonment of the *res* in question is three years. Since the New York statute would impact upon the *res* in question prior to the Delaware statute, New York's right to assert a valid claim upon PWJC is clear.

It is important to note that in the *Texas* case, the Court clearly indicates that the state of corporate domicile of the debtor, in this instance, Delaware, does not, and never can attain a status amounting to the *paramount* escheator. The Court said:

> "... [T]he state of corporate domicile should be allowed to cut off the claims of private persons only, retaining the property for itself *only until some other state comes forward with proof that it has a superior right to escheat.*" [Emphasis added]

PROOF OF SERVICE

I, RICHARD L. SUTTON, certify that I am counsel of record for plaintiff, the State of Delaware, that I am a member of the Bar of the Supreme Court of the United States, and that on the 19th day of May, 1988, I served copies of the foregoing Plaintiff's Reply Brief In Support Of Its Motion For Leave To File Complaint, on all parties required to be served by depositing such copies, first-class postage prepaid, in a United States Post Office, addressed as follows:

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